Nos. 89-1714, 90-113 and 90-114

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES, INC., *et al.*,
Respondents.

CLINCHFIELD COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

CONSOLIDATION COAL COMPANY,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fourth Circuits

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BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE SUBMITTED IN SUPPORT OF THE MINE OPERATORS

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BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE SUBMITTED IN SUPPORT OF THE MINE OPERATORS

The National Council on Compensation Insurance submits this Brief Amicus Curiae[1] to respectfully request the reversal of the decisions of the United States Court of Appeals for the Fourth Circuit in Nos. 90-113 and 90-114, and the affirmance of the decision of the United States Court of Appeals for the Third Circuit in No. 89-1714.

INTEREST OF AMICI

The National Council on Compensation Insurance ("NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes more than 750 insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout most of the United States. In thirty-two states, including most major coal mining states, NCCI collects data and develops premium rates and rating plans for workers' compensation insurance. NCCI also manages various workers' compensation assigned risk plans and the National Workers' Compensation Reinsurance Pool (the "Pool"). Pool members reinsure among themselves several categories of risk that arise under the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 (1988) (the "Act"). In particular, the Pool is the only commercial vehicle available to small or high-risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1990), or to purchase direct coverage from a state fund or insurance carrier. Most of NCCI's members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, 15% to 20% of all federal claim liabilities are insured or reinsured by the Pool. Approximately 50% of

[1] In accordance with Rule 37.3, the written consents of all parties are submitted herewith.

federal black lung liabilities that may be allocated to an individual mine owner are commercially insured.[2] The companies and competitive state insurance funds represented by NCCI account for more than 90% of the premium dollar volume of all insured U.S. workers' compensation coverages, including those available under the federal black lung program.

In federal black lung claims, the insurer is a party to the litigation and, as such, participates directly on behalf of its insured. 20 C.F.R. § 725.360(a)(4); *Tazco, Inc. v. Director, Office of Workers' Compensation Programs*, 895 F.2d 949, 952-53 (4th Cir. 1990). In this capacity, the insurance carrier hires defense counsel and bears the costs of litigation and administration. *Id.* A workers' compensation insurance policy including coverage for the federal black lung risk effectively transfers to the carrier all of the rights and obligations of the insured mine operator. *See Pyro Mining Co. v. Slaton*, 879 F.2d 187 (6th Cir. 1989). If benefits are awarded in an insured claim, they are paid by the carrier.

NCCI and its members have a direct, immediate and substantial interest in the outcome of this litigation.

ARGUMENT

A. Introduction

It is the purpose of this Brief Amicus Curiae to convey to this Court the special concerns of the workers' compensation insurance industry arising as a result of the decisions of the United States Court of Appeals for the Fourth Circuit in *Taylor v. Clinchfield Coal Co.*, 895 F.2d

[2] Liability arising out of claims in which the miner was last employed prior to January 1, 1970, and certain uninsured liabilities are paid by the Black Lung Disability Trust Fund. 26 U.S.C. § 9501(d), *incorporated by reference into* 30 U.S.C. § 932(j)(1). The Trust Fund is financed by a producer tax on coal. 26 U.S.C. § 4121.

178 (4th Cir. 1990), and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990). Wholly apart from the reasoning and authorities upon which these decisions are based, the results they mandate are intolerable and senseless. In both of these cases, the coal miner who filed a claim for benefits under the Act did not have any occupationally related disease or disability. The court below deemed these facts irrelevant and effectively mandated a workers' compensation award in both cases. The Fourth Circuit's holding affects not only these two cases, but thousands of additional still pending claims for benefits that were originally filed prior to April 1, 1980.[3] If these decisions are affirmed, substantial benefits[4] will be awarded on account of total disability or death due to black lung disease, even if the mine operator or carrier conclusively proves that the miner did not have the disease, did not suffer any disability due to the disease or did not die due to it. Congress surely did not intend this result.

B. The Black Lung Insurance Program

It is not necessary to burden the Court with another history of the Act or the interim presumptions, or to attempt to explore the intricacies of the rules and statutory

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[3] The claims of Taylor and Dayton were adjudicated under the Department of Labor "interim" eligibility rules. 20 C.F.R. § 727.203 (1990). The interim rules were superseded by permanent eligibility regulations published by the Department that became effective on April 1, 1980. 20 C.F.R. § 718.2; *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 139 (1987).

[4] Benefits are typically payable retroactive to the date the claim was originally filed unless the proof establishes a specific month of onset of disability. In a survivor's claim, benefits are payable retroactive to the month of the miner's death. 20 C.F.R. § 725.503 (1990). Post-judgment interest on past due benefits is included in all awards, *id.* § 725.608, as are certain medical treatment benefits, *id.* § 725.701. An employee or carrier that has elected to defend a claim is also required to pay the claimant's attorney's fee if an award is made. 33 U.S.C. § 928, *incorporated by reference into* 30 U.S.C. § 932(a).

provisions involved. The parties will surely cover those points in detail. The contribution the insurance industry can make to the discussion lies in an explanation of how black lung insurance works, with the hope of demonstrating that Congress would not have and did not sanction the result reached by the court below.

Insurance carriers called upon to underwrite the federal black lung risk have always faced difficult challenges. The coal industry, unlike some other major industrial sectors of the economy, is composed of thousands of mostly small producers.[5] Most of these companies would have no financial ability to pay or even defend a single claim, the cost of which averages from $118,315.88 for a claimant without dependents to $185,659.69 for a married miner. Costs can go much higher. The costs of litigation and administration of claims are not included in these data. *See* U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981).

Workers' compensation insurance, unlike most commercial lines, cannot limit the maximum liability of the carrier. If a carrier offers workers' compensation coverage, it must provide full coverage for the insured employer's statutory workers' compensation liability, come what may, in order for the employer to comply with mandatory insurance requirements imposed by state workers' compensation laws.[6]

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[5] In 1989, approximately 55.6% of U.S. coal tonnage produced was mined by the thirty largest operators. *See* National Coal Ass'n, *Facts About Coal 1990* 15 (1990). During the period from 1980-1989, the number of operating coal mines in the United States varied from 3337 to 4424. *Id.* at 16.

[6] State insurance officials regulate insurance premium rates and policy provisions. In workers' compensation lines of coverage, the carrier must provide full coverage for all insured employers. The Act contemplates the regulation of rates and coverages for the federal program by state agencies. 30 U.S.C. § 933(a). A premium charged for a policy covering the federal black lung risk must be approved by the appropriate state agency. The Department of Labor has no authority to regulate premium rates.

Under laws regulating the business of insurance, retroactive adjustment of workers' compensation premium rates to cover losses generated by the insurance carriers' miscalculations of the cost of a risk is impossible. The entire estimated cost of insuring a risk is fixed at the time a policy is sold and, when an occupational disease claim is filed, it attaches to the policy in effect on the date of the workers' last employment. *See* 20 C.F.R. § 726.203.[7] Premiums collected for that policy must cover all claims attributable to that policy. Premiums charged for policies in future years are not and cannot be calculated to pay the cost of previously incurred claims. In the black lung context, all the premium dollars that ever will be collected for the federal risk produced by claims filed prior to April 1, 1980, have already been charged and paid, and cannot be supplemented. The reasonable pricing assumptions made then, more than a decade ago, are irrevocable.

For these reasons, workers' compensation insurance premium ratemaking has evolved into an exacting science. Predictability, affordability, and a careful evaluation of potential risks are critical features of this very complex process. Pooling arrangements, like the National Workers' Compensation Reinsurance Pool, are essential to accommodate otherwise uninsurable employers.[8] To avoid catastrophic unfunded losses, industry specialists devote great care to reach an understanding of the nature of the risk to be insured. Sometimes errors are made, and the carriers

[7] If the miner was last employed before January 1, 1974, the effective date of the Department of Labor's program, the claim attaches to the policy in effect on the date the claim is first filed against the insured. 20 C.F.R. § 726.203(c).

[8] The pools have not shown an operating profit in the last decade and between 1984 and 1988 were subsidized by other markets for losses exceeding $4.4 billion. Rate increases adequate to cover these losses would simply not be affordable. NCCI, *Issues Report 1989* at 2-9 (1989).

and pools are answerable when that occurs.[9] That is to be expected, and is simply a reality of the insurance business.

The decisions below suggest, however, that the industry did not just make a terrible mistake in relying on the plain language of the Act and the Department of Labor's ("DOL") interim eligibility presumption, 20 C.F.R. § 727.203, but that it was the victim of an amazing deception. Although the DOL presumption and the Act clearly limit the risk to total disability or death due in part to pneumoconiosis, the Fourth Circuit now informs us that by virtue of 30 U.S.C. § 902(f)(2), the Act is not a workers' compensation act at all. Rather, it mandates compensation for coal miners and their families on account of old age, retirement, disabilities whatever their cause, and death. The workers' compensation insurance industry wrote no policies, collected no premiums and had no basis on which to ascertain that, in writing a limited workers' compensation insurance policy covering mine owners whose employees contracted disabling black lung disease, it was really insuring the life and health of all coal miners. The industry was not asked to, did not, and would not have insured this risk. There is, in fact, no generally available unified insurance product in this country that could be purchased for a risk of these dimensions.

From NCCI's perspective, it surely was the Fourth Circuit and not DOL which missed the point.

C. DOL's Rebuttal Rules Are Valid

The central question presented in these cases concerns the validity of DOL's third and fourth rebuttal methods in light of section 402(f)(2) of the Act. 30 U.S.C. § 902(f)(2). Section 402(f)(2) provides that in the category of claims that are at issue, the eligibility criteria applied in their adjudication shall not be more restrictive than the criteria

[9] If errors are made in favor of the insurance industry, future rate calculations usually must reflect an appropriate adjustment.

applied by the Social Security Administration ("SSA") prior to July 1, 1973. DOL's third method allows the denial of a claim in which the section 727.203(a) presumption is invoked if: "The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3). The fourth method allows rebuttal if: "The evidence establishes that the miner does not, or did not, have pneumoconiosis." *Id.* § 727.203(b)(4). SSA's interim presumption rebuttal criteria do not expressly provide for rebuttal by these methods. *Id.* § 410.490(c). The Fourth Circuit struck down DOL's rules for this reason.[10]

The interpretations of the Act reflected in DOL's additional rebuttal regulations must be sustained on judicial review if they are consistent with the Act and reasonable. *NLRB v. United Food & Commercial Workers' Union*, 484 U.S. 112, 123 (1987). In applying this standard, this Court looks first to the plain language of the Act, and the inquiry ends if that language is reasonably clear. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1987). If the statutory mandate does not address the precise question presented, this Court defers to the agency's approach if it reflects "a permissible construction of the statute." *Id.*

In the regulatory setting presented, the question is whether the Act authorizes DOL's adjudicators to inquire into the existence of pneumoconiosis and related total dis-

[10] In *Taylor v. Clinchfield*, the court below also held that the less restrictive SSA rebuttal rules applied in a case in which the claimant invoked the DOL presumption on the basis of arterial blood gas tests. 895 F.2d at 182. This holding does not follow from the text of the rules or the Act. SSA's criteria contain no blood gas based interim presumptions. DOL added this invocation method in 20 C.F.R. § 727.203(a)(3). *Compare id.* with *id.* § 410.490(b). Section 402(f)(2) of the Act would not, therefore, proscribe any reasonable rebuttal criteria adopted by DOL, where the blood gas presumption alone is invoked. The Fourth Circuit was clearly wrong in its treatment of *Taylor*.

ability or death after the claimant has obtained presumptive entitlement. We submit it is difficult to read the Act to put these central issues out of bounds in any entitlement determination. The Act provides benefits *only* on account of total disability or death due to occupationally related pneumoconiosis. 30 U.S.C. § 901(a). The Act prohibits the assignment of liability to any mine operator unless the operator was, at least in part, responsible for causing total disability or death due to pneumoconiosis. 30 U.S.C. § 932(c). The definition of "total disability" and the instructions listing the essential components of that definition in section 402(f) of the Act, 30 U.S.C. § 902(f), plainly provide that the only kind of total disability the agencies are authorized to address in their regulations is total disability related to pneumoconiosis. 30 U.S.C. § 902(f)(1)(A). The only type of insurance contract a mine operator is required to purchase is one which guarantees the payment of benefits on account of total disability or death due to pneumoconiosis. 30 U.S.C. § 933(a), *referencing* 30 U.S.C. § 932.[11] Finally, the Act's requirement that all relevant evidence be considered in the adjudication of claims, making mention of many of the particular types of evidence that are relevant in determining whether the miner had or was seriously disabled by pneumoconiosis, does not per-

[11] It is not unimportant that DOL's insurance regulations prescribe an endorsement that must be attached to every commercial insurance policy sold to cover the federal risk. The black lung endorsement, which is a part of almost every federal black lung insurance policy ever sold, triggers the policy only if the claim against the policy is established "by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period. . . ." 20 C.F.R. § 726.203(a). There is some question whether there can be any coverage under this endorsement if the miner does not have the disease, and exposure has caused no injury. While the absence of adequate insurance would not release the operator from liability, the insurance contract might release the carrier from its obligation to pay claims on behalf of the operator. NCCI is not aware of any instance in which this policy defense has been raised, but it is certainly a possibility.

mit an adjudication in which evidence that is germane to these issues is simply ignored. *See* 30 U.S.C. § 923(b); *Mullins Coal Co.*, 484 U.S. at 49-50.

It does not seem likely that the reference to SSA's "criteria" in section 402(f)(2) was intended to repeal so many of the Act's specific provisions, or require a construction of them that deprives their plain words of ordinary meaning. As a general rule, these related provisions of a statute should be construed harmoniously. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 614-17 (1944). The Act directed the Secretary of Labor to write regulations assigning liability to mine operators and their insurers when a coal mine employee of the operator suffered total disability or death due to pneumoconiosis. The Secretary wrote such rules and was required to include among the rules provisions like those in 20 C.F.R. § 727.203(b)(3), (4). This should be enough to sustain the validity of these rules.

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988), suggests that a review of SSA's "criteria" is required before bringing the question to closure. Perhaps that is true, but the question decided in *Pittston Coal Group* was much simpler than the questions presented here. The offending criterion in DOL's presumption examined in *Pittston Coal Group* related only to the methods available for obtaining presumptive entitlement in the case of a miner who had not worked in the industry for at least ten years. SSA allowed presumptive entitlement under its interim presumption if the claimant established pneumoconiosis by x-ray, biopsy, or autopsy evidence and had ten years of employment or otherwise proved the connection between the test findings and coal mining exposure. By not allowing the shorter-term miner equivalent access to the presumption, DOL wrote a more restrictive rule. *Pittston Coal Group*, 488 U.S. at 119.

The Act, apart from section 402(f)(2), was, according to this Court, silent on the precise question presented in *Pittston Coal Group*. That is not the case here. The Act is not silent. It clearly mandates the consideration of whether the miner has pneumoconiosis, is totally disabled by it or died due to pneumoconiosis as an absolute prerequisite to eligibility and liability. The Secretary of Labor ensured that these matters would be appropriately considered in the adjudication of individual claims, in accordance with the unambiguous mandate of the Act. The challenged rules are valid for this reason.[12] The word "criteria" must be construed in keeping with the statute as a whole.

A thorough examination of SSA's criteria does not detract from the conclusion compelled by the Act. The examination reveals mostly that SSA was not very careful in drafting its regulations. It is, nevertheless, reasonably clear that SSA required the claimant to prove the existence of pneumoconiosis *before* its interim presumption could be invoked. That is, once the claimant met the medical criteria of 20 C.F.R. § 410.490(b)(1), it still had to be proven that the (b)(1) evidence demonstrated a condition arising out of coal mine employment. 20 C.F.R. § 410.490(b)(2), *incorporating by reference id.* §§ 410.416, 410.456. As a statutory matter, a medical finding is not a finding of pneumoconiosis unless the condition found is a disease or impairment arising out of coal mine employment. 30 U.S.C. § 902(b). Since SSA's rule requires inquiry into whether the health impairment triggering section 410.490(b)(1) also arose out of coal mine employment, it, like DOL's presumption, directs the adjudicator to determine whether the miner has pneumoconiosis in every case. DOL conducts

[12] There is nothing in the legislative history to indicate a contrary intention, and it appears that Congress made a special effort to impress upon the Secretary of Labor the need to write regulations ensuring the thorough and complete litigation of cases. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309.

this inquiry after the burden of persuasion shifts to the operator, but DOL's rule on this account is not more restrictive than SSA's.

The other DOL rebuttal rule invalidated by the court below permits a factual inquiry into whether the miner's disability or death was caused by his occupational disease. 20 C.F.R. § 727.203(b)(3). DOL permits an award if the disease contributes, in whole or in part, to the total disability or death. *Id.* SSA's disability causation standard is in 20 C.F.R. § 410.426(a) and it is a "primary reason" standard. While the primary reason standard is not stated in section 410.490's rebuttal provisions, it is cross-referenced. 20 C.F.R. § 410.490(c)(2), *incorporating by reference id.* § 410.412(a)(1), *incorporating by reference id.* § 410.426. SSA's death causation standard is at 20 C.F.R. § 410.450 and it is simply a "death due to" rule. It is not cross-referenced, but it could be construed to apply in this very complex scheme. *See Farmer v. Weinberger*, 519 F.2d 627 (6th Cir. 1975).

In sum, SSA's criteria fail to compel the conclusion that they preclude the fact inquiries prescribed in DOL's third and fourth rebuttal rules. The same type of cross-referencing exercise that revealed the invalidity of DOL's ten-year rule in *Pittston Coal Group* demonstrates the validity of DOL's rebuttal rules. If there is ambiguity here, DOL did not exceed the bounds of "permissible" in conforming SSA's confusing scheme to the clear requirements of the Act.[13]

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[13] In an amici curiae brief filed by the insurance industry in *Pittston Coal Group*, the industry accepted the holdings of several courts of appeals stating that the SSA interim presumption, once invoked by x-ray, biopsy, autopsy or ventilatory test evidence could be rebutted only if it was proven that the miner was working or able to work. In these decisions, the existence of pneumoconiosis or a link between the disease and total disability was not relevant in determining entitlement. *See e.g., Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part, Pittston Coal Group*, 488 U.S. at 121; *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 283 (6th Cir. 1983). The decision in *Pittston Coal Group* focused attention more closely on the precise words of SSA's criteria leading now to the conclusion that they fairly clearly do not state what the courts of appeals had believed. There is no indication that SSA itself advocated the views of the *Haywood* court, for example, and the argument presented here by NCCI is refined accordingly.

D. Special Insurance Industry Concerns

Beyond the traditional legal arguments, the workers' compensation insurance industry's perspective on the principles presented in this case make it difficult to accept the theory reflected in the decisions below. Congress harbored no intent to lure the industry into writing insurance coverage for an uninsurable risk. Total disability or death due to occupational pneumoconiosis is an understandable and insurable risk. A workers' compensation program masquerading as an unemployment, general disability, retirement or life insurance program for coal miners, is not. The history of the insurance industry's involvement demonstrates Congress's special concern for insurability and strongly supports DOL's understanding that in designing section 727.203, the agency was required to preserve fairness for the private parties involved.

Mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, but the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by the Department of Labor and asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[14] Given repeated assurances by the Department and Congress during the period from 1973 to the present day that the black lung claims process would,

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[14] *Hearings on H.R. 10760 and S. 8188 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, the insurance industry provided coverage at affordable rates.

Following liberalizations of entitlement rules in the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and largely because of the retroactive application of section 727.203 to previously filed claims, it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the insurance industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[15] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong.,1st Sess. 16, 30 (Comm. Print 1981); *see also* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing . . . this retroactive liability. . . . [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

[15] This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (c), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 26 U.S.C. § 9501(d). The Fund is currently more than $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

The partnership between Congress, many federal agencies and the commercial liability insurance industry is pervasive. This industry is called upon frequently to assist Congress in the implementation of national policies by providing private parties the insurance coverage they need to be in compliance with federal laws.[16] In order for this partnership to be maintained, there must be an acceptable level of predictability and stability in the risks Congress creates. The partnership cannot survive if the industry is considered merely an adjunct to the Federal Treasury. Private insurance cannot fund entitlements that are subject to the changing whims of Congress. The financial structure of the industry is simply not designed to and cannot respond to endless retrospective tinkering with liability concepts. NCCI believes that Congress is well aware of this fact. It is unimaginable that Congress would, in the black lung program, ask the insurance industry to fund a compensation scheme for previously filed claims based on the Fourth Circuit's reading of 30 U.S.C. § 902(f)(2). It is equally improbable that Congress would do so without clearly expressing such intent.

When Congress liberalized the Act in 1978, most of the claims here in question were already insured under preex-

[16] Just a few examples are the Longshore Act, 33 U.S.C. § 932; the Price-Anderson Act, 42 U.S.C. § 2210 (nuclear plant accidents); 42 U.S.C. §§ 5154, 5172 (nuclear disaster relief); 7 U.S.C. § 1503 (crop insurance); 33 U.S.C. § 1321(d), (p) (maritime disasters); 30 U.S.C. § 1257(f) (surface coal mining operations); 41 U.S.C. § 351 (government contractors); 46 C.F.R. § 540.20 (1987) (cruise ships); 14 C.F.R. Part 205 (1987) (air carriers). The industry is now working closely with Congress to develop insurance programs for earthquake related losses.

isting insurance policies. Those policies provided coverage only for total disability or death due to black lung disease and they cannot be rewritten. There is no proof that the 1978 amendments would rewrite these policies to require payment for unexpected and unknown risks wholly divorced from the stated purpose of the Black Lung Act. *See* 30 U.S.C. § 901(a) ("It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease. . . . ").

In sum, there are many sound reasons why the Secretary of Labor designed section 727.203 to ensure a fair opportunity to defend, not the least of which is that the benefit-funding mechanisms available and the rights of claim defendants required protection.

E. There is a Significant Constitutional Problem Presented

This Court will ordinarily construe a statute to avoid constitutional difficulty, if possible. *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 108 S. Ct. 1392, 1397 (1988). The Court may easily do so here. Section 402(f)(2) of the Act does not compel a construction that imposes black lung liability on an employer who caused no disease, disability or death. But if section 402(f)(2) imposes liability without any responsibility, the minimal rationality required by the Due Process Clause is hard to find. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The right to a fair hearing also guaranteed by the Due Process Claim is similarly elusive.

The proven facts by which either DOL's or SSA's interim presumption may be invoked give rise to, at very best, a weak inference of total disability or death due to pneumoconiosis. *See Mullins Coal Co.*, 484 U.S. at 143. In most instances the inference will not be justified at all, particularly where the invocation criteria were intentionally set so low, that no health impairment of any kind is really required to cause a burden of proof shift. *See Pittston Coal Group*, 488 U.S. at 138 n.8 (Stevens, J., dissenting) (quoting Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 7.

The due process test for determining the validity of civil presumptions requires a rational connection between "the fact proved and the ultimate fact presumed." *Usery*, 428 U.S. at 28. That essential connection cannot be demonstrated within the Fourth Circuit's reading of section 402(f)(2).

Moreover, "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The Fourth Circuit's holding prohibiting the defense from proving the key facts in most claims clearly exceeds the bounds of this important protection.

However it is done, Congress may not transfer property from one party to another, consistent with the Due Process Clause, unless there is a rational basis for doing so. In this country, *all* litigants are entitled to a fair hearing and to insist upon some valid reason justifying congressional disruption of their property rights. In the two cases decided by the Fourth Circuit that are being reviewed here, the mine operators are simply not responsible for causing any harm to the claimants. If it has any meaning left in a civil economic rights context, the Due Process Clause does not authorize this taking.

CONCLUSION

The decisions of the United States Court of Appeals for the Fourth Circuit invalidating 20 C.F.R. § 727.203(b)(3) and (4) should be reversed. The decision of the United

States Court of Appeals for the Third Circuit upholding section 727.203(b)(3) should be affirmed.

Respectfully submitted,

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